ANTARA STEEL MILLS SDN BHD v. CIMB INSURANCE BROKERS SDN BHD

COURT OF APPEAL, PUTRAJAYA
MOHD HISHAMUDIN YUNUS JCA
HAMID SULTAN ABU BACKER JCA
UMI KALTHUM ABDUL MAJID JCA
[CIVIL APPEAL NO: W-02-160-01-2014]
25 MAY 2015

ARBITRATION: *Award – Agreement that award final and binding – Whether agreement merely restating provisions in s. 36 of Arbitration Act 2005 – Whether agreement superfluous*

TORT: *Negligence – Professional negligence – Insurance broker – Failure to include certain items in insurance policy – Whether insurance broker owed duty of care – Whether breached duty of care – Whether financial loss directly attributable to breach of duty by insurance broker*

The appellant ('plaintiff') purchased an insurance policy known as 'Industrial All Risks Insurance Policy' from the respondent ('defendant'). Subsequently, there was an explosion in the plaintiff's plant leading to a claim based on the insurance policy. When the insurer denied liability, the parties resorted to an arbitration proceedings. In the course of the arbitration proceedings, the plaintiff discovered that ten items that were part of the plaintiff's specified working expenses ('the ten specified items'), for which premium had been paid by the plaintiff, were not covered in the insurance policy, contrary to its instruction to the defendant. The plaintiff therefore sought to amend its claim before the arbitral tribunal and to rectify the insurance policy so as to include the ten specified items. The arbitral tribunal, although allowed the plaintiff's claim in general, had disallowed the plaintiff's claim in relation to the ten specified items and had also refused the prayer for rectification of the insurance policy. As such, the plaintiff filed a claim against the defendant for professional negligence in making the placement of the insurance policy on behalf of the plaintiff. The High Court, in dismissing the plaintiff's claim held that, although there was a breach of duty of care by the defendant, it did not cause the plaintiff's financial loss and that the loss was caused by the fact that the plaintiff had agreed with the insurer that the arbitral tribunal's award was final, binding and non-appealable. Hence, this appeal by the plaintiff.

Held (allowing plaintiff's claim)
Per Mohd Hishamudin Yunus JCA delivering the judgment of the court:

(1) The plaintiff had successfully established negligence on the part of the defendant wherein the defendant owed a duty of care towards the plaintiff and the defendant had breached the duty of care. The financial loss suffered by the plaintiff was directly attributable to the breach of duty of care on the part of the defendant. (paras 16 & 17)

(2) There was a misconception that the decision of the arbitral tribunal was appealable when, under the Arbitration Act 2005 ('the Act'), there is no right of appeal against the decision of the arbitral tribunal. Therefore, the agreement entered into by the parties to state that the award of the arbitral tribunal was final, binding and unappealable was superfluous as they were merely restating what has already been provided for in s. 36 of the Act. (paras 18 & 19)

(3) Sections 37 and 42 of the Act do not provide for an appeal against the award of an arbitral tribunal. Section 37 provides for an application to the High Court by an aggrieved party to set aside the award of an arbitral tribunal in the limited circumstances as specified by the section, whereas s. 42 merely provides for referral on a question of law to the High Court. The defendant did not plead in its statement of defence that the plaintiff had entered into an agreement with the insurer not to invoke either s. 37 or s. 42 of the Act or that, based on the facts and law, the plaintiff could have successfully invoked before the High Court either s. 37 or s. 42 of the Act to impugn the arbitral award. (para 20)

Bahasa Malaysia *Translation Of Headnotes*

Perayu ('plaintif') telah membeli polisi insurans yang dikenali sebagai 'Polisi Insurans Semua Risiko Industri' daripada responden ('defendan'). Kemudian, berlaku satu letupan di loji plaintif yang menjurus kepada tuntutan berasaskan kepada polisi insurans tersebut. Apabila syarikat insurans menafikan liabiliti, pihak-pihak memulakan prosiding timbang tara. Dalam penjalanan prosiding timbang tara, plaintif mendapati bahawa sepuluh item yang merupakan sebahagian Perbelanjaan Kerja Khusus plaintif ('sepuluh item khusus'), yang baginya plaintif telah membayar premium, tidak dilindungi dalam polisi insurans tersebut, bertentangan dengan arahannya kepada defendan. Plaintif oleh itu memohon untuk meminda tuntutannya untuk memasukkan sepuluh item khusus tersebut. Tribunal timbang tara, walaupun telah membenarkan tuntutan plaintif secara umum, telah menolak tuntutan plaintif berkaitan dengan sepuluh item khusus tersebut dan juga telah menafikan permohonan untuk pembetulan dalam polisi insurans. Justeru plaintif memfailkan tuntutan terhadap defendan bagi kecuaian profesional dalam memasukkan polisi insurans bagi pihak plaintif. Mahkamah Tinggi, dalam menolak tuntutan plaintif memutuskan bahawa, walaupun terdapat pelanggaran kewajipan berjaga-jaga oleh defendan, ia tidak menyebabkan kerugian kewangan kepada plaintif dan bahawa kerugian tersebut diakibatkan oleh fakta bahawa plaintif telah bersetuju dengan syarikat insurans bahawa award tribunal timbang tara adalah muktamad, mengikat dan tidak boleh dirayu. Oleh itu, rayuan ini oleh plaintif.

Diputuskan (membenarkan tuntutan plaintif)
Oleh Mohd Hishamudin Yunus HMR menyampaikan penghakiman mahkamah:

(1) Plaintif telah berjaya membuktikan kecuaian oleh defendan di mana defendan mempunyai kewajipan berjaga-jaga terhadap plaintif dan defendan telah melanggar kewajipan berjaga-jaga tersebut. Kerugian kewangan yang dialami oleh plaintif adalah akibat langsung pelanggaran kewajipan berjaga-jaga oleh defendan.

(2) Terdapat salah tanggapan bahawa keputusan tribunal timbang tara adalah boleh dirayu apabila, di bawah Akta Timbang Tara 2005 ('Akta'), tidak ada hak merayu terhadap keputusan tribunal timbang tara. Oleh itu, perjanjian yang dimasuki oleh pihak-pihak untuk menyatakan bahawa award tribunal timbang tara adalah muktamad, mengikat dan tidak boleh dirayu adalah tidak perlu kerana ia semata-mata menyatakan semula apa yang telah diperuntukkan dalam s. 36 Akta.

(3) Seksyen-seksyen 37 dan 42 Akta tidak memperuntukkan rayuan terhadap award tribunal timbang tara. Seksyen 37 memperuntukkan permohonan kepada Mahkamah Tinggi oleh pihak yang terkilan untuk mengenepikan award tribunal timbang tara dalam hal keadaan yang terhad seperti yang dinyatakan dalam seksyen tersebut, manakala s. 42 hanya memperuntukkan rujukan atas persoalan undang-undang kepada Mahkamah Tinggi. Defendan tidak memplidkan dalam penyataan pembelaannya bahawa plaintif telah memasuki perjanjian dengan syarikat insurans untuk membangkitkan sama ada s. 37 atau s. 42 atau bahawa, berdasarkan fakta dan undang-undang, plaintif boleh dengan jayanya membangkitkan sama ada s. 37 atau s. 42 untuk mempersoalkan award timbang tara di hadapan Mahkamah Tinggi.

Case(s) referred to:
Awangku Dewa Pgn Momin & Ors v. Superintendent of Lands and Surveys, Limbang Division [2015] 3 CLJ 1 CA ***(refd)***
Pembinaan LCL Sdn Bhd v. SK Styrofoam (M) Sdn Bhd [2007] 3 CLJ 185 CA ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 36, 37, 42

For the appellant - Brian Foong (Eolanda Yeo with him); M/s Cheang & Ariff
For the respondent - Romesh Abraham (Lim Qiu Jin with him); M/s Shook Lin & Bok

[Editor's note: For the High Court judgment, please see Antara Steel Mills Sdn Bhd v. CIMB Insurance Brokers Sdn Bhd [2014] 5 CLJ 707.]

Reported by S Barathi

A

JUDGMENT

Mohd Hishamudin Yunus JCA:

Introduction

B **[1]** This appeal is against the decision of the learned Judicial Commissioner of the High Court of Kuala Lumpur given on 20 December 2013.

[2] In her decision, the learned Judicial Commissioner had dismissed the appellant's claim against the respondent for damages in the sum of RM9,571,700 for professional negligence committed by the respondent in C the course of acting as an insurance broker on behalf of the appellant in the placement of an insurance policy.

[3] On 9 December 2014, after hearing submissions, we unanimously allowed the appeal with costs.

D **[4]** We now give our grounds.

[5] At the High Court, the appellant was the plaintiff, whilst the respondent was the defendant. Thus, in this judgment, we shall use the terms 'plaintiff' and 'defendant', as the case may be, to refer to the parties.

E **Facts Of The Case**

[6] The facts are not disputed. The plaintiff owns a hot briquetted iron plant in the Federal Territory of Labuan. It purchased through its broker, the defendant, an insurance policy known as 'Industrial All Risks Insurance Policy' for the period from 1 January 2005 to 31 December 2005 ('the F insurance policy'). It was purchased from an insurer, the Progressive Insurance Bhd ('the insurer'). The plaintiff had instructed the defendant to ensure that the insurance coverage would include, among others, ten items that were part of the plaintiff's specified working expenses (hereinafter referred to as 'the ten specified items'). These ten specified items were:

G (i) catalyst amortisation;

(ii) nitrogen;

(iii) plant salary and wages;

H (iv) depreciation - plant;

(v) insurance - plant;

(vi) tug boat rental;

(vii) yard and jetty rental;

I (viii) reversal of provision for shutdown cost;

(ix) interest expense; and

(x) plant consultancy/studies.

[7] On 31 October 2005, there was an explosion in the plaintiff's plant. The effect of the explosion caused the plant to be closed for 166 days. The plaintiff submitted an insurance claim based on the insurance policy. But the insurer denied any liability. In order to resolve the dispute, the parties resorted to arbitration in accordance with the arbitration clause as provided for in the insurance policy.

[8] However, in the course of the arbitration proceedings, the plaintiff, much to its dismay, discovered that, contrary to its instruction to the defendant, the ten specified items were not covered in the insurance policy. The premium paid by the plaintiff to the insurer included the coverage for the ten specified items.

[9] On the advice of the defendant, as its broker, the plaintiff applied to amend its claim before the arbitral tribunal and to rectify the insurance policy so as to include the ten specified items.

[10] On 18 December 2008, the arbitral tribunal, in general, allowed the plaintiff's claim; but it disallowed the plaintiff's claim in relation to the ten specified items, as these items were not covered by the insurance policy. The arbitral tribunal refused the plaintiff's prayer for a rectification of the insurance policy. The arbitral tribunal ruled (at para. 137 of the arbitration award):

> All in all, the evidence falls far short of that which is required to support a plea of rectification – a remedy which is rarely granted in the context of a substantial commercial contract.

[11] By a letter of 5 January 2009, the plaintiff informed the defendant of its intention to claim from the latter a sum of RM9,571,700, this amount being the financial loss it suffered as a result of the rejection of the ten specified items by the arbitral tribunal.

[12] On 25 September 2009, the plaintiff issued a formal letter of demand to the defendant.

[13] Thereafter, the plaintiff filed the present writ action claiming damages against the defendant for professional negligence committed by the defendant in making the placement of the insurance policy on behalf of the plaintiff.

The Defence

[14] The defendant admits that it breached its duty of care towards the plaintiff, but denies any liability in negligence. The defendant, instead, contends that the breach of the duty of care on its part did not result in any financial loss to the plaintiff. According to the defendant, the financial loss incurred by the plaintiff was a result of its own doing; for the plaintiff had, at the commencement of the arbitration proceedings, entered into an agreement with the insurer that the decision of the arbitral tribunal shall be final, binding and unappealable. The defendant submits that as a result of this agreement, the plaintiff was precluded from 'appealing' against the decision of the arbitral tribunal pursuant to ss. 37 and 42 of the Arbitration Act 2005 ('the Arbitration Act').

The Decision Of The High Court

[15] The learned Judicial Commissioner accepted the defendant's contention that although there was a breach of duty of care on its part, nonetheless, it (the defendant) did not cause the plaintiff's financial loss. The loss, according to the learned Judicial Commissioner, was caused by the fact that the plaintiff had agreed with the insurer that the arbitral tribunal's award was final, binding and non-appealable. By so agreeing, the plaintiff had precluded itself from challenging the correctness of the arbitral award. In dismissing the plaintiff's claim, this is what the learned Judicial Commissioner said:

> The plaintiff's position in the arbitration proceedings
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> 41. The next point taken by the defendant was that it was not liable for the losses suffered by the plaintiff based on the decision of the plaintiff to agree with the insurers, at the commencement of the arbitration proceedings, that the decision of the arbitral tribunal shall be final, binding and non-appealable. It is argued that the plaintiff has only itself to blame for its present predicament. It had lacked reasonable foresight in agreeing with the insurers to accept that the decision of the arbitrator shall be final and unappealable. By virtue of this agreement, it has now lost its right under sections 37 and 42 of the Arbitration Act 2005 to challenge the award of the arbitral tribunal in refusing rectification of the IAR 2005 Policy. The defendant argued the plaintiff has suffered the losses claimed in this action, because of the aforesaid agreement and not because of its breach of its duty to the plaintiff.
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> 42. There is, undoubtedly, considerable force in this argument. It is true that the plaintiff by agreeing to accept that the decision of the arbitral tribunal as final and non-appealable, has precluded itself from challenging the correctness of the said decision in regard to the plaintiff's right to apply for rectification. In the light of this fact, it would be unjust and inequitable for the plaintiff [to claim] the loss from the defendant particularly when there is evidence that the premium collected by the insurers covered the SWE items. The defendant as an insurance broker, is not entitled to institute an action for rectification of the IAR 2005 policy. This is a remedy which is only available to the plaintiff and the insurers. The remedy of rectification exists to remedy mistakes. It is reasonably probable that the High Court could have taken a contrary view, and decided the issue in favour of the plaintiff, if the plaintiff had not forfeited its right to challenge the decision of the tribunal. In that event, this action against the defendant, may not have been necessary.
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> ...
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> 44. It is true that in this case, the plaintiff did bring an action against the insurers by way of arbitration proceedings to challenge the rejection of its claim. But, because the outcome of the arbitration proceedings had exposed the defendant to liability, it was incumbent on the plaintiff to have appealed against the decision in the face of compelling evidence that the premium charged and collected by the defendant on behalf of the insurers included the disputed SWE items. In the circumstance, I am unable to agree with the plaintiff, that the defendant should be made liable for the loss suffered by it. The plaintiff has only itself to blame for

the dilemma that it is in because of the unfortunate agreement with the insurers. The plaintiff would have been entitled to recover this loss from the defendant, if the High Court had affirmed the decision of the arbitral tribunal. In that case, it would not be open to the defendant to contend that the plaintiff had not acted reasonably in challenging the decision of the tribunal.

The Decision Of This Court

[16] On the facts of the instant case, we are of the opinion that the plaintiff has successfully established negligence on the part of the defendant. It is not disputed that the defendant owes a duty of care towards the plaintiff and that the defendant had breached that duty of care. It is also not disputed that the plaintiff had suffered financial loss in the sum of RM9,571,700 by reason of the non-coverage of the ten specified items. Indeed, these are the findings of the learned Judicial Commissioner, and we agree with her. What is in dispute, however, is this: who had caused the plaintiff's financial loss? The learned Judicial Commissioner, based on the defendant's argument, had taken the view that the plaintiff itself was responsible for this loss by entering into the 'non-appealable' agreement with the insurer and thereby precluding itself from challenging the decision of the arbitral tribunal.

[17] In the present case, with respect, we take the view that the financial loss of RM9,571,700 suffered by the plaintiff is directly attributable to the breach of duty of care on the part of the defendant.

[18] In our judgment, with respect, there is no merit in the defendant's argument which raises the issue of causation in regard to the financial loss suffered by the plaintiff. In the first place, there is a misconception here on the part of the defendant as well as on the part of the learned Judicial Commissioner that the decision of the arbitral tribunal is appealable. Under the Arbitration Act, there is no right of appeal against the decision of the arbitral tribunal. The decision of the arbitral tribunal is final, binding and unappealable. Section 36 of the Arbitration Act provides:

An award is final and binding

36.(1) An award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding on the parties and may be relied upon by any party by way of defence, set-off or otherwise in any proceedings in any court.

(2) The arbitral tribunal shall not vary, amend, correct, review, add to or revoke an award which has been made except as specifically provided for in section 35.

[19] Thus, there is nothing creative or innovative on the part of the parties when they entered into an agreement at the commencement of the arbitration proceedings to state that the award of the arbitral tribunal is final, binding and unappealable. The parties are just restating what is already provided for in s. 36 of the Arbitration Act. In fact this agreement to preclude the right of appeal by the parties is superfluous. In *Pembinaan LCL Sdn Bhd v. SK*

Styrofoam (M) Sdn Bhd [2007] 3 CLJ 185; [2007] 4 MLJ 113 Gopal Sri Ram JCA (as he then was) in delivering the unanimous judgment of the Court of Appeal explained the effect of s. 36 of the Arbitration Act in the following terms:

> [14] It is the unanimous view of all the authorities that the High Court in exercising its statutory jurisdiction under the Arbitration Act 1952 does not enjoy appellate jurisdiction. See, for example, *Puri Construction Pvt Ltd v. Union of India* AIR 1989 SC 777, where it was held that:
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> > ... a court while examining the objections taken to an award filed by an arbitrator is not required to examine the correctness of the claim on merits. The court cannot sit in appeal over the views of the arbitrator by re-examining and re-assessing the materials.
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> [15] I have read and re-read the judgment under appeal. From the language employed in the learned judge's judgment it may be readily gathered that he was treating the application before him as though it were an appeal.

(See also the decision of this court in *Awangku Dewa Pgn Momin & Ors v. Superintendent of Lands and Surveys, Limbang Division* [2015] 3 CLJ 1.)

[20] We do, however, note that the learned Judicial Commissioner has in her grounds of judgment cited ss. 37 and 42 of the Arbitration Act as if these provisions provide for an appeal against the award of the arbitral tribunal. We do not propose to labour on these provisions. It is sufficient for us just to state here that the learned Judicial Commissioner, with respect, was mistaken in her grounds of judgment: these provisions do not provide for an appeal against the award of an arbitral tribunal. Section 37 merely provides for an application to the High Court by an aggrieved party to set aside the award of an arbitral tribunal in the limited circumstances as specified by the section. And s. 42 merely provides for referral on a question of law to the High Court. For the sake of completeness, we just wish to add that in any event, in the present case, the defendant did not plead in its statement of defence that the plaintiff had entered into an agreement with the insurer not to invoke either s. 37 or s. 42 of the Arbitration Act; or that, based on the facts and the law (which the defendant must explain in its pleading), the plaintiff could have successfully invoked before the High Court (but failed to do so) either s. 37 or s. 42 of the Arbitration Act to impugn the arbitral award.

[21] Accordingly, we allowed the plaintiff's claim of RM9,571,700 with interests and costs of RM50,000 for here and below as per prayers (i), (ii) and (iii) of para. 42 of the statement of claim. With regard to prayer (ii) on interests, we allowed it at the rate of 5% per annum with effect from the date of the order of the High Court (20 December 2013).

[Appeal allowed with costs.]